



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Taylor-Forge Engineered Systems, Inc.

File: B-236408

Date: November 3, 1989

DIGEST

1. Bid proposing delivery on an f.o.b. origin basis with freight allowed, contrary to solicitation requirement for delivery on an f.o.b. destination basis, is nonresponsive since it reduces the contractor's responsibility by shifting the risk of loss of or damage to goods during transit from the contractor to the government.
2. Bid which is ambiguous--because bidder included conflicting delivery terms in cover letter and bid form--was properly rejected as nonresponsive since under one interpretation the bid takes exception to a material term of the solicitation.
3. Where bidder creates an ambiguity in its bid by offering different f.o.b. term than required by invitation for bids (IFB), ambiguity may not be waived or corrected as a minor informality, since offering a different f.o.b. term than required by the IFB is a material deviation.
4. A bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have an unfair advantage over other bidders by being able to choose to make its bid responsive or nonresponsive.

DECISION

Taylor-Forge Engineered Systems, Inc., protests the rejection of its bid under invitation for bids (IFB) No. MSFC 8-89-10, issued by the National Aeronautics and Space Administration, Marshall Space Flight Center (MSFC), for a liquid hydrogen pressure vessel. MSFC interpreted a cover letter submitted with the bid as creating an ambiguity as to whether Taylor-Forge agreed to the IFB requirement for

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delivery on a f.o.b. destination, and for that reason rejected Taylor-Forge's bid as nonresponsive. Taylor-Forge contends that its bid, when read as a whole, is not ambiguous, and therefore is responsive.

We deny the protest.

The IFB contained Federal Acquisition Regulation (FAR) § 52.247-34, entitled "F.O.B. Destination," a clause which provides that the contractor shall be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract. In this regard, the IFB stated that the "manufacturer shall be responsible for transportation f.o.b. MSFC Huntsville, Alabama." Although Taylor-Forge typed "ok TFES [Taylor-Forge Engineered Systems]" in the IFB section requiring shipment f.o.b. MSFC Huntsville, Alabama, it also submitted a separate cover letter with its bid indicating "F.O.B. Point: Paola, Kansas with rail freight allowed to the jobsite." As a result, the contracting officer concluded that Taylor-Forge's bid was ambiguous since the cover letter indicating shipment on an f.o.b. origin basis was inconsistent with the notation on Taylor-Forge's bid form indicating agreement with the IFB requirement for delivery f.o.b. destination.

Taylor-Forge challenges the rejection of its bid as nonresponsive, maintaining that its bid is not ambiguous. MSFC disagrees, arguing that to the extent that Taylor-Forge's cover letter submitted with its bid--which specifies that shipment would be f.o.b. origin with rail freight allowed--clearly conflicts with the bid form--in which Taylor-Forge agrees to the IFB's requirement for shipment on an f.o.b. destination basis--the bid is ambiguous and, therefore, nonresponsive. We agree.

A bidder's intention to be bound by the solicitation requirements must be determined from the bid itself, including any unsolicited information such as cover letters or extraneous documents submitted with the bid, at the time of bid opening. Vista Scientific Corp., B-233114, Jan. 24, 1989, 89-1 CPD ¶ 69. If a bid is ambiguous as to a material provision, so that it is nonresponsive under one interpretation and responsive under the other, it cannot be accepted. J.G.B. Enters., Inc., B-219317.2, July 31, 1985, 85-2 CPD ¶ 109, aff'd, B-219317.4, Sept. 9, 1985, 85-2 CPD ¶ 280. Specifically, a bid document which indicates that delivery will be on an f.o.b. origin basis when the solicitation requires that bids be submitted on an f.o.b. destination basis renders the bid nonresponsive, since it shifts the risk of loss of or damage to the supplies in transit from

the contractor to the government contrary to the terms of the solicitation. See Stewart-Warner Corp., B-220788, Oct. 30, 1985, 85-2 CPD ¶ 494.

Here, Taylor-Forge submitted a bid form indicating that delivery would be on an f.o.b. destination basis. In doing so, Taylor-Forge agreed to be responsible for any loss of and/or damage to the vessel occurring before receipt of the shipment at MSFC Huntsville, Alabama. See FAR § 52.247-34. However, by also submitting a separate cover letter with its bid proposing to ship the vessel on an f.o.b. origin basis with rail freight allowed to the job site, Taylor-Forge created an ambiguity as to its agreement to the IFB requirement for shipment on an f.o.b. destination basis. Specifically, Taylor-Forge's cover letter effectively reduced its responsibility under its bid for the vessel's safety during transit from Paola, Kansas, to Huntsville, Alabama, since under the language of the cover letter, Taylor-Forge agreed only to be responsible for any damage or loss to the vessel occurring before delivery to the carrier in Paola, Kansas. See FAR § 52.247-31(a)(4). Accordingly, even assuming, as Taylor-Forge argues, that its bid price reflects shipment on an f.o.b. destination basis, MSFC properly rejected the bid as nonresponsive since Taylor-Forge's cover letter clearly shifted the risk of loss or damage to the vessel during transit from Taylor-Forge to the government contrary to the terms of the solicitation.

Taylor-Forge maintains that there is no material difference in the wording of its bid form and the notation in its cover letter, citing National Heater Co., Inc. v. Corrigan Co. Mechanical Contractors, Inc., 482 F.2d 87 (8th Cir. 1973). We do not find the case Taylor-Forge cites controlling.

The dispute in the Corrigan case concerned a sale contract for equipment between two private parties. The court held that the language used by the seller in accepting the buyer's purchase order--"\$275,640.00 Total Delivered to Rail Siding"--constituted an agreement to deliver the equipment to the construction site, rather than f.o.b. point of shipment, notwithstanding a printed statement on the seller's acknowledgment providing that "delivery of equipment hereunder shall be made f.o.b. point of shipment unless otherwise stated." (Emphasis added.) The court held that the seller's specific language agreeing to delivery to the "rail siding," which the parties agreed was at the construction site, not the point of shipment, fell within the "otherwise stated" provision in the seller's printed acknowledgment.

Contrary to Taylor-Forge's contention, the Court in Corrigan clearly did not hold that a bid offering delivery f.o.b. origin with freight allowed is the equivalent of a bid offering delivery f.o.b. destination. Further, the case is not controlling here, where there are two inconsistent provisions regarding delivery in Taylor-Forge's bid package such that it was unclear whether Taylor-Forge agreed to the delivery f.o.b. destination requirement in the IFB.

Taylor-Forge also argues that even if its cover letter created an ambiguity, MSFC should nevertheless waive the ambiguity as a minor deviation and, consequently, award the contract to Taylor-Forge. Our Office has consistently held, however, that to the extent that a bidder offers a different f.o.b. term than is required by the IFB, the differing term is not a minor deviation, but in fact is a material deviation going to the substance of the bid. Infrared Indus., Inc., B-181739, Nov. 20, 1974, 74-2 CPD ¶ 272. Consequently, we find that MSFC properly refused to waive this material deviation since such a waiver would be contrary to the competitive system by offering Taylor-Forge what would be, in effect, a different contract than offered other bidders. Id.

Taylor-Forge finally contends that it should be allowed to reform the language contained in its cover letter to reflect shipment on an f.o.b. destination basis since reformation would not prejudice the other bidders. It is well-established, however, that a bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have the competitive advantage of choosing to accept or reject the contract by choosing to make its bid responsive or nonresponsive. Stewart-Warner Corp., B-220788, supra.

The protest is denied.



James F. Hinchman
General Counsel